No. 12602

IN THE

United States Court Of Appeals

For the Ninth Circuit

B. M. CRENSHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief Of Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

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Bozeman, Montana.

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CITATIONS.

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BOZEMAN CHRONICLE PRINT

Statement of Pleadings

Complaint.

The action is brought in the name of the United States of America, and pursuant to the Housing and Rent Act of 1947, as amended (50 U.S.C.A. 1881-1906 and P.L. 31, 81st Congress, 1st Session). In the Complaint it is alleged that jurisdiction is conferred by Section 205 and 206(b) of the Act and Title 28 U.S.C.A. 1345 (Tr. 2).

The Defendant, Crenshaw, of Bozeman, Montana, landlord and operator of a certain controlled multiple unit housing accommodation at Six West Babcock Street, Bozeman, Montana, has rented and offered for rent such housing accommodations; that in the judgment of the Housing Expediter the Defendant has engaged in acts and practices which constitute a violation of Section 204 of said Act in that Defendant has charged the persons named in Schedule "A", for the periods when maximum rentals were established, amounts which were more than that set forth in said schedule and which resulted in the overcharges therein computed; that more than thirty days have expired and that none of the persons so charged have commenced any action therefor against the Defendant pursuant to Sec. 205 of the Act; that the overcharges alleged in said Schedule "A" amount to $1,082,50, and Plaintiff prays for a temporary injunction and for an Order directing the Defendant to pay those persons who have been charged rentals in excess of the maximum, sums as follows:

Name	Amount
C. A. Labbe	$ 45.00
W. H. Westfall	50.00
R. G. Martin	175.00
L. W. Konecki	300.00
V. Cameron	25.00
K. Davis	325.00
L. S. Mann	37.00
(L. Reeves	
(L. Ketterer	120.00
R. H. Henke	180.00
	$1,257.00

and for treble damages and for such other and further relief as to the Court may seem just and equitable (Tr. 2—5).

Answer.

The Defendant's Answer admits the action is brought in the name of the United States and under the pursuant to the Rent Act of 1947 as amended and as Plaintiff has alleged in Paragraph I of the Complaint (Tr. 7); denies each and every allegation of Paragraphs II, IV, V, and VI of the Complaint and particularly that jurisdiction is conferred, and denies that Plaintiff's rental operations have resulted in overcharges as alleged or at all (Tr. 7). In Paragraph III of his Answer and as a further and separate defense, Defendant alleges that said laws and acts described in Paragraphs I and II of said Complaint are unconstitutional and do not confer jurisdiction and that the acts therein referred to, violate and are repugnant to the due process clause of the Fifth Amendment of the Federal Constitution.

The cause came on for trial September 29, 1949, at Butte, Montana, the Honorable W. D. Murray, United States District Judge presiding, without a jury, and certain facts having been stipulated by the parties and evidence both oral and documentary having been introduced, the Court found that the Defendant has charged persons in excess of the maximum rents established under and pursuant to the Housing and Rent Act of 1947, as amended, for housing accommodations at Bozeman, Montana, to-wit:

Name	Amount
C. A. Labbe	$ 45.00
W. H. Westfall	50.00
R. G. Martin	175.00
V. Cameron	25.00
K. Davis	325.00
R. H. Henke	180.00
L. W. Konecki	360.00

Accordingly judgment was entered and the Defendant was ordered to pay the sum of $1262.50 to the Treasurer of the United States.

STATEMENT OF THE CASE

At the opening of the trial herein, Defendant moved for dismissal of the Complaint for want of jurisdiction of the Court over the subject matter (Tr. 24) which motion was by Court overruled (Tr. 35).

Pursuant to stipulation in this case it was agreed that rent orders had been made and issued affecting the housing accommodations concerning which the Plaintiff contends there were overcharges, but Defendant maintains he did not receive notices of such rent orders; moreover

he is entitled to extra charges for furniture and furnishings supplied to tenants where the Court found there had been an overcharge. Lists of such furnishings as requested by tenants involved is found in Defendant's testimony (Tr. 81—103).

SPECIFICATIONS OF ERRORS

1. That the Housing and Rent Act of 1947, as amended, is unconstitutional and void.

Preamble to the Act of 1949 is to be found in Section 201 (a) and (b) of the Act of 1947 which are carried forward into the Act of 1949. This preamble declares the policy of Congress under the heading "Declaration of Policy" in the following language:

> "(a) The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared.
>
> "(b) The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because

of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

"(c) To the end that these policies may be effectively carried out with the least possible impact on the economy pending complete decontrol, the provisions of this title are enacted."

2. That the evidence is insufficient to sustain the Trial Court's findings and judgment therein.

3. That the Trial Court erred in finding the appellant Crenshaw, as landlord, had received notice of rent orders, upon which judgment was passed, in that there was lack of definite proof that any authorized personnel of the Bozeman Rent Office or any other authorized Rent Office had mailed such notices. And there was testimony of the appellant that notices or rent orders were to be sent to his attorney. Both appellant and his attorney denied that either had received notices of rent orders from any Rent Office.

SUMMARY OF ARGUMENT

I.

Section 204 (j) of the Housing and Rent Act of 1949 is invalid and unconstitutional because:

A. It contains an illegal delegation of legislative powers by Congress:

1. To the Housing Expediter.
2. To various local boards.

3. To the governors of all states, territories and possessions of the United States.
4. To the legislatures of the various states, territories and possessions of the United States.
5. To the governing bodies of each and every incorporated city, town and village in the United States.

B. It contains an illegal delegation of legislative powers by Congress because the standards set out for exercise of legislative power by the above mentioned persons and governmental units are vague and general and depend upon the meanings ascribed by said persons and governmental units to the following phrases:

1. Sufficient construction (Section 204 (e)).
2. Otherwise reasonably met (Section 204 (e)).
3. Creation of additional rental units by conversion (Section 204 (c)).
4. Adequately provided (Section 204 (j) (i)).
5. Specifically expressed its intent (Section 204 (j) (1)).
6. No longer necessary (Section 204 (j) (2)).
7. Such a shortage of accommodations as to require rent control no longer exists (Section 204 (j) (3)).

II.

Section 209 of the Housing and Rent Act of 1949 is unconstitutional and invalid because it contains too broad a delegation of legislative power from Congress to the Housing Expediter without sufficient delineation of the limits of said power.

III.

The unconstitutionality of either or both of Section 204 (j) and 209 affects the entire Housing and Rent Act of 1949 and makes the entire statute invalid. The statute cannot exist without Section 209 and the intent of Congress to adopt the provisions of the Act only on condition that Section 204 (j) be included therein is manifest and unescapable. The clear intention of Congress overcomes any presumption of severability based upon Section 303.

IV.

The evidence is insufficient to sustain the Trial Court's finding and judgment therein.

V.

The Trial Court erred in finding that Appellant Crenshaw, as landlord, had received notice of rent orders establishing maximum rent, upon which judgment was passed, in that there was lack of definite proof that any authorized personnel of the Bozeman Rent Office or any other authorized Rent Office having mailed such notices, and there was testimony of Appellant that notice of rent orders was to be sent to his attorney and both appellant and his attorney denied that either had received rent orders from any rent office.

VI.

The Court erred in refusing to recognize contracts for extra service and extra equipment provided at tenants request over and above those required by the rental orders

ARGUMENT

I.

Section 204 (j) of the Housing and Rent Act of 1949 is unconstitutional.

A. The Standards contained in Section 204 (j) are inadequate. The Delegation of Legislative Authority is complete.

By Section 204 (j) Congress has delegated legislative authority to decontrol to the following classes or types of persons; said authority to be exercised upon conditions hereinafter noted:

1. To the respective governors of every state, territory, and possession of the United States; such authority to be exercised:

A. When the state has "adequately provided for the establishment and maintenance of maximum rents"; or

B. When the state "has specifically expressed its intent that state rent control shall be in lieu of federal rent control".

2. To the legislature of every state, territory or possession of the United States which shall by law declare that Federal rent control "is no longer necessary" in its area or any part thereof.

3. To the 'governing body" of each and every incorportated city, town or village in the United States which shall make a "finding" as a result of "a public hearing" conducted by it "that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village".

These delegations of power to decontrol are in addition to the authority granted by the Act to the Housing Expediter to decontrol any area or portion thereof if in his judgment the need for control no longer exists and in addition to the duty vested in the Expediter to decontrol luxury housing accommodations if in his judgment such action would result in creation of additional housing units by conversion (Section 204 (c);

Still a further delegation appears in those provisions of the Act which vest in Local Advisory Boards power to decontrol the area of their jurisdiction or any part thereof if in the judgment of the Board the need for control no longer exists due to sufficient contruction of new housing or if the demand for rental housing accommodations has been otherwise reasonable met (Section 204 (e).

In the statute at bar, there is no right of review from the determinations of fact to be made by governors, legislatures or governing bodies of cities, towns or villages. The Housing Expediter must approve in ministerial fashion the desire for decontrol expressed by these governmental agencies.

Situations where power is delegated to a single responsible office holder appointed under Congressional supervision or to a Commission subject to judicial review are vastly different from a delegation of complete power to governors, legislatures and governing bodies of cities and villages. Admittedly, this Court has sanctioned delegation to duly constituted Commissions or Administrators. But, appellant has cited no case in any manner comparable to the case at bar in which there is complete delegation of legislative power to so many different types

of nominees to be exercised under such varying circumstances.

The exercise of the delegations of power made by this statute depend upon the meaning of the following words or phrases:

1. Sufficient construction (Section 204 (e)).
2. Otherwise reasonably met (Section 204 (e)).
3. Creation of additional rental units by conversion (Section 204 (c)).
4. Adequately provided (Section 204 (j) (1)).
5. Specifically expressed its intent (Section 204 (j) (1)).
6. No longer necessary (Section 204 (j) (2)).
7. Such a shortage of accommodations as to require rent control no longer exists (Section 204 (j) (3)).

And, to make the vice of this statute more apparent, the meanings of these seven phrases are to be determined not by one single Commission or authority but by:

a. The Housing Expediter.
b. The various local boards.
c. The governor of any state, (territory or possession of the United States).
d. The legislature of any state.
e. The governing body of any incorporated city, town or village.

Delegation of power under this Act is absolute and complete and subject to no rule or reason.

Cases most applicable to this situation are Schechter

Poultry Corp. v. United States, 295 U. S. 495 and Panama Refining Co. v. Ryan, 293 U. S. 388. The last named case is of special significance. This Court held unconstitutional Section 9c of the National Industrial Recovery Act. The statute authorized the President of the United States to prohibit transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by any state law or by any valid regulation promulgated by a duly authorized state agency (293 U. S. 414, 415). The statute in the case at bar goes much beyond that in the case of Panama Refining Co. v. Ryan. There, the statute directed the President to act in accordance with State laws or regulations. Here, the discretion and power to decontrol is vested in governors, in legislatures and even in governing bodies of cities and villages. If such delegation is upheld as proper, the constitutional doctrine of separation of governmental powers is a nullity.

In the case of Wayman v. Southard, 10 Wheat. I Chief Justice Marshall was careful to point out that the statute there under consideration merely required federal courts to give effect to varying methods of legal procedure in several states. The Chief Justice pointed out, however, (p. 46);

> "The state assemblies do not constitute a legislative body for the union. They possess no portion of that legislative power which the Constitution vests in Congress, and cannot receive it by delegation."

We submit that the Federal Government cannot relinquish to governors, legislatures and governing bodies of cities, towns and villages the right to declare that the area over which they have sovereignty shall be exempt

from operation of federal law. In this type of situation, where Congress has admittedly acted under its war power, the only possible method of cooperation between federal and state sovereignties is complete removal of federal regulation from the field and relinquishment of the subject matter to state control. Exercise of sovereign war power by Congress is not a proper field for "cooperation" by state or city governments as provided by this statute.

To sustain the statute it is to disregard two fundamental principles:

1. The war power of Congress is not a proper subject of delegation to the states, to governors or to governing bodies of cities or villages (Constitution Section 8, Article I).

2. The legislative powers reserved to Congress by the Constitution cannot be delegated to the several states (Wayman v. Southard, 10 Wheat, at page 46).

We submit that if the need for Federal regulation exists, then Congress should act accordingly, and the right of self-elimination from the needed regulation should not be vested in governors, legislatures, or the governing bodies of incorporated cities, towns and villages. Such complete and wholesale delegation of power is the key to irregularities and disorganization and not to a gradual and orderly change. Generally speaking, the use of power by Congress on the basis of existence of war or war emergency should be scrutinized with care. (Concurring opinion of Mr. Justice Jackson in Woods v. Miller Co., 333 U. S. at page 147). If emergency controls are necessary and cannot be terminated without undue injury to citizens, then such controls should be maintained by the Congress. But, if the emergency is

of such nature that the controls can be lifted by so many different persons in such diverse situations, then there is no emergency and the entire field of control should be left to the several states.

II.

SECTION 209 OF THE HOUSING AND RENT ACT OF 1949 IS AN UNCONSTITUTIONAL DELEGATION OF POWER.

As originally adopted, the Emergency Price Control Act of 1942 (Section 2 (d)) granted the Housing Expediter power to promulgate regulations regarding eviction of tenants under local law. Bowles v. Willingham, 321 U. S. 503, did not pass upon the validity of this delegation of power and is concerned only with Section 2 (b) of the Emergency Price Control Act of 1942. But by the Housing and Rent Act of 1947, Congress reentered the field of providing for evictions. This Act prescribed a detailed series of rules governing evictions and set out various situations in which this appellant might have sought possession of his property pursuant to Montana Law.

Section 209 of the Housing and Rent Act of 1949 provides as follows:

> "Section 209. Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are

likely to result in rent increases inconsistent with the purposes of this Act."

Reference to Section 209 of the Act in question shows that it gives the Expediter no standard whatsoever. To begin with, he may act whenever in his judgment action may be necessary or proper to effectuate the purposes of the Act as he interprets them. Or, if he so desires, he may remain passive. The Expediter is left to exercise his own judgment and interpretation as to the purpose of the Act as intended by Congress. The Expediter is expressly given power to "regulate or prohibit" as he sees fit. This power attaches to "speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act". The Expediter may exercise his judgment as to which rent increases are inconsistent with the purposes of the Act and further as to which practices are equivalent to or even likely to result in such inconsistent rent increases. This broad language means that the Expediter is absolute czar over evictions. He has power to curtail all evictions of any kind throughout the effective date of the legislation. He has unlimited power to impose any conditions which he sees fit upon evictions and upon the rights of the appellant to resort to his remedies under the law of the State of Montana.

There are no procedural safeguards of any kind in this section of the Act to furnish protection against exercise of arbitrary power (United States v. Rock Royal, 307 U. S. at page 576). It is no answer to say that the regulations governing evictions as actually

adopted under Section 209 are in fact reasonable, proper and effective. The present Expediter may possibly be succeeded in office by another official whose exercise of discretion may not be held within such reasonable limits. The vice in the statute is the delegation of unlimited power and the possibility of absolute exercise thereof. It is submitted that Section 209 of the Housing and Rent Act of 1949 violates the rights of this appellant as granted by Section 1 of Article I and Paragraph 18 of Section 8 of Article I of the Constitution of the United States.

III.

SECTION 204 (j) AND 209 ARE INSEPARABLE FROM THE REMAINDER OF THE ACT AND INVALIDATION OF THE ENTIRE ACT MUST FOLLOW FROM INVALIDATION OF EITHER SECTION 204 (j) or SECTION 209.

In discussing the provisions of the Housing and Rent Act of 1949 Congress knew that the device of vesting power to decontrol in the Housing Expediter had been approved by the Supreme Court in the case of Woods v. Miller Co., 333 U. S. 138. Had Congress wished rent control to remain in effect with the same provision for decontrol by the Expediter it would have been simplicity itself for Congress merely to extend the operation of the Act, including said provision for decontrol. However, Congress was not satisfied with this provision of the law and extended operation of the Act only upon the addition thereto of added machinery for decontrol as set forth in Section 204 (j). The very fact that Congress added new features and methods of decontrol in addition to those already expressed in the statute shows

that Congress wished and intended the statute to be extended only with embodiment therein of the new methods of decontrol. This accords with the expressed intention of Congress in the preamble of the Act of 1947 to terminate controls at the earliest practicable date.

In the case of Carter v. Carter Coal Co., 298 U. S. 238, 312, the opinion points out that the question of separability is a matter of ascertaining the intent of Congress. The presumption in favor of divisibility does not give to the statute any force or effect different from that which would have been desired by Congress. In this case, the Housing and Rent Act of 1949 without Section 204 (j) would be vastly different from the Housing and Rent Act in its present condition. Therefore, we submit that the valid and invalid portions of the Act are individable and as a result the whole Act is invalid and the trial Court had no jurisdiction in this case.

IV.

THE CASE ON THE MERITS

1. The evidence is insufficient to sustain the Trial Court's findings and judgment. To be bound by the rent orders and for Plaintiff to prevail herein it is necessary to establish that Defendant had notice of such rent orders. Plaintiff's proof is lacking in this respect as is hereinafter shown.

2. There is a failure of proof to establish that notices of rent orders were given Defendant. True, when a notice is mailed, there is a presumption of delivery, but in 66 C.J.S., p. 665, we find the following text:

> "A notice duly mailed will be presumed to have been delivered, but this presumption is rebutable, as discussed in Evidence, Sec. 136."

Under the heading of Evidence in 31 C.J.S., p. 785, we find the rule applied that presumption of due receipt of a letter or other mail matter may be rebutted by evidence that it was not in fact received. (Renland vs. First Nat'l Bank, 4 P. 2d 488, 90 Mont. 424).

The testimony of appellant Crenshaw (Tr. 91) denied that he ever received any of the rent orders.

According to some authorities, addressee's positive denial of receipt of mail matter renders the presumption of little weight (Gibson vs. Rouse, 142 P. 464, 81 Wash. 102).

Or may even entirely overcome the presumption especially if uncontradicted (U. S. - Ripy vs. Cloverleaf Life & Casualty Co., C.C.A. Tex. 9 Fed. 2d 324).

And it has been held that such denial or other proof of non-receipt raises a presumption that the letter was never mailed.

Idaho - Hobson vs. Security State Bank 57 P 2d 685, 56 Ida. 601.

Mullock vs. Citizens Nat'l Bank of Salmon, 250 P. 648, 43 Ida. 214.

50 A.L.R. 1418

N. H. Wilson vs. Frankfort Marine Accident & Plate Glass, 91 A. 913, 77 N. H. 344

Okla. - Kneeling vs. Travelers 67 P. 2d 944, 180 Okla. 99

Texas - Border State Life Ins. Co. vs. Noble, Civil App. 133 S. W. 2d 119.

In 30 Am. Jur. p. 247 Sec. 28 we find the rule set forth that where notice was properly mailed its receipt will be

presumed in the absence of evidence to the contrary, and the deposit in a street letterbox or delivery to a mail carrier on duty is considered a proper mailing. This presumption may be overcome by evidence that the notice never was in fact received.

Bickerdike vs. Allen 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782

Casco Nat'l Bank vs. Shaw 79 Me. 376, 10 A. 67, 1 Am. St. Rep. 319

Huntley vs. Whittier, 105 Mass. 391, 7 Am. St. Rep. 536

Vann vs. Marbury 100 Ala. 438, 14 So. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70.

By Section 93-1301-7 (24) Revised Codes of Montana 1947, under what are denominated disputable presumptions, it is provided that a letter duly directed and mailed was received in the regular course of mail. By said statute it is declared that disputable presumptions are satisfactory if uncontradicted. We submit that a presumption of this kind, if contradicted, ceases to be satisfactory evidence and evidence which is not satisfactory by Section 93-301-13, Revised Codes of Montana, 1947, is slight evidence. Satisfactory evidence is required to establish a fact.

A search of the record in this case fails to disclose mailing of notices by any particular person. However, the record does show that it was the practice of the Bozeman Office to mail such notices. Therefore, it appears that the presumption that notices were mailed is entirely overcome by the testimony of the appellant Crenshaw who denied the notice of such rent orders (Tr. 91).

Moreover, we submit that Plaintiff at the request of his tenants furnished extras in the way of furnishings and services which the District Court in equity and good conscience should have allowed to compensate appellant and offset overcharges contended for by the Plaintiff, even though this Court might feel constrained to hold that proof of notice is sufficient.

We respectfully submit that the Housing Act of 1949 is invalid and unconstitutional and that the evidence in support of Plaintiff's Complaint is insufficient to sustain the Trial Court's findings and judgment; that proof of notice is lacking to bind appellant on the rent orders which are the basis of Plaintiff's cause of action; that the testimony shows that the Defendant in his transactions as a landlord has acted in good faith and should have been allowed for extra furnishings, and if the same had been allowed, the Trial Court in equity and good conscience should not have decreed that there were overcharges; and that the Defendant is entitled to a reversal of the judgment which has been entered in the District Court.

Respectfully submitted,

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